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IN THE

Supreme Court of the United States

October Term, 1964

No. 350

In the Matter of the Application of ISIDORE BALABAN, PHYLLIS BALABAN, ARTHUR GOTTLIEB and LENORE GOTTLIEB,
Petitioners,

for an order under Article 78 of the Civil Practice Act

—against—

MAX J. RUBIN, JAMES B. DONOVAN, CLARENCE SENIOR, JOSEPH G. BARKAN, JOHN F. HENNESSY, MRS. MORRIS SHAPIRO, LLOYD K. GARRISON, MORRIS IUSHEWITZ, and AARON BROWN, constituting the Board of Education of the City of New York; CALVIN E. GROSS, Superintendent of Schools; BERNARD E. DONOVAN, Executive Deputy Superintendent of Schools; and FRANCIS A. TURNER, Assistant Superintendent of Schools,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Statement

Petitioners seek a writ of certiorari to review a judgment of the Court of Appeals of the State of New York, entered May 7, 1964, affirming an order of the Supreme Court of New York, Appellate Division, Second Depart-

ment, entered March 10, 1964, which reversed a judgment of the Supreme Court of New York, Kings County, entered September 12, 1963, which had nullified an attendance area zone established by the respondents for a new junior high school in the Borough of Brooklyn, City of New York, known as Junior High School 275.

Opinions Below

The opinion of the Supreme Court, Kings County (BAKER, J.) is reported in 40 Misc 2d 249, 242 N.Y.S. 2d 973. The opinions of the Appellate Division of the Supreme Court, Second Department, are reported in 20 AD 2d 438, 248 N.Y.S. 2d 574. The opinions of the New York Court of Appeals are reported in 14 NY 2d 193, 199 N.E. 2d 375.

Question Presented

Are the petitioners' rights under the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution violated by the adoption of an attendance area zone for an integrated school whereby the petitioners' children and all other children residing within the zone are assigned to the new school, regardless of their race, creed, color or national origin?

Facts

(1)

The question of site selection for new Junior High School 275 came before the Board of Estimate of the City of New York on March 10, 1960 (Cal. No. 117). Three alternate sites were considered: (1) the entire block bounded by Rockaway, Riverdale, Thatford and Newport Avenues, (2)

the entire block bounded by Rockaway, Lott, Thatford and Hegeman Avenues, and (3) the entire block bounded by Rockaway, Hegeman and Thatford Avenues and Linden Boulevard. (Journal of Proceedings, Board of Estimate, March 10, 1960, p. 2166.)

On March 24, 1960 (Cal. No. 22) the Board of Estimate, on recommendation of the Board of Education, selected site 3, upon which J.H.S. 275 has since been erected. (*ibid.*, March 24, 1960, p. 2501.) Dr. Francis A. Turner, who, as head of the Central Zoning Unit, is a member of the Site Selection Committee of the Board of Education, explains why this site was recommended (R. 40):

> "The school site, at Linden Boulevard and Rockaway Avenue, is located in a fringe area, very close to an area to the west which is predominantly white. The site was selected with a view to feeding into it children from the East Flatbush area, who are predominantly white, as well as children from two Brownsville schools, who are predominantly Negro and Puerto Rican, so as to achieve a measure of integration among the school children in the new school."

To Dr. Morris Blodnick, Assistant Superintendent of Schools in charge of that district, was assigned the task of preparing a proposed zone for the new school. (His plan is outlined in yellow on the map, R. 47.) The Board of Education rejected the Blodnick proposal because the school site would not be centrally located and because Dr. Blodnick "had failed to accord adequate consideration to the undesirable *de facto* segregation of Negro and Puerto Rican children that would obtain in J.H.S. 275 if his plan had been adopted" (R. 39).

In the zoning plan adopted by the respondents for J.H.S. 275, the westerly line of the zone was established at East 93rd Street, because it is equidistant between J.H.S. 285 and J.H.S. 275. (J.H.S. 285 is the school which petitioners' children would have attended if J.H.S. 275 had not been built.) None of the children who live in the area bounded by East 93rd Street on the west are further from J.H.S. 275 than from J.H.S. 285 and those who live east of East 93rd Street are closer to the new school than to J.H.S. 285 (R. 41).

In the establishment of a school zone the Board of Education considers the following six factors:

1. Distance from home to school.
2. Utilization of school space.
3. Convenience of transportation.
4. Racial integration of the school.
5. Topographical barriers.
6. Continuity of instruction.

(R. 13.)

All of these factors were considered and were satisfactorily resolved by the Board of Education in the zone it adopted for Junior High School 275.

The zoning plan adopted by the Board of Education was the result of most careful deliberation and consideration of many factors and opinions. As is apparent from Petitioners' Exhibits "A" and "B" (R. 18-24), as well as from the affidavit of Dr. Turner, assistant superintendent of schools in charge of zoning, consideration of the various factors

which were relevant to outlining a zone for Junior High School 275, extended over a period of several months. During that time, the school officials concerned with the project conferred with and heard the arguments and objections of a great number of interested civic groups and their representatives, including the East Flatbush Civic Association. (R. 44)..

Upon review of the exchange of information, objection and suggestion over that period of time and a consideration of the plan recommended by Dr. Blodnick, the Board of Education approved the plan challenged in this proceeding.

With respect to the factor of the distance from home to school, the plan adopted by the Board was markedly superior to Dr. Blodnick's tentative proposal. Thus, a sizable number of the children in the East Flatbush area included in the Board's plan will have a shorter distance to walk to new J.H.S. 275 than to J.H.S. 285. Moreover, the greatest proportion of those children from the Brownsville area who are not included in the new J.H.S. 275 zone will travel much shorter distances by attending other schools. Under Dr. Blodnick's proposal, they would have been obliged to travel a much greater distance to attend new J.H.S. 275 than any of the other children in the new J.H.S. 275 zone. By these modifications, the travel distances favored the adopted plan, without disturbing continuity of education.

Convenience of transportation, another major factor, appeared to be of equal weight in both plans. Of the remaining two factors, viz., utilization of school space and racial integration of the school, the Board weighed the latter objective against *immediate* attainment of utilization of school space, and again, the factor of continuity of instruction.

Attainment of maximum utilization of school space was planned over a three-year period in order to accommodate the factors of racial integration and continuity of instruction.

The use of the factor of integration of the enrollment in the new J.H.S. in the selection of the school site and establishment of the new zone was explained by Dr. Bernard Donovan, Executive Deputy Superintendent of Schools (R. 19):

> "Although designed to relieve overcrowding of junior high schools in Brownsville, the specific site of Junior High School 275 was selected by the Board of Education primarily because it is located on the fringe of an area which is predominantly Negro and Puerto Rican and near an area in which the large majority of residents is white. Board of Education policy is that integration be one of several factors in the selection of school sites and in the zoning of schools. The Board believes that integration is an important requirement for good education, and that segregated education is inferior education."

It was expected that the seventh year pupils (the only class to be enrolled in the first year of operation) would have a racial composition of 35.2 per cent Negro, 33.6 per cent Puerto Rican and 31.2 percent white (R. 18-24).

As the President of the Board of Education stated (Pet., Exhibit "B" R. 22). "The weight to be attached to each [of the six factors in the Board's decision] necessarily varies under the circumstances of each case." Ultimately, of course, the decision as to just what weight to give each of the factors is for the Board to decide. Thus, the Board gave greater weight to the racial integration factor than had

Dr. Blodnick. For the latter, in practically ignoring that factor, would have created at J.H.S. 275 a *de facto* segregated school. The Board felt that factor had not been weighed properly: "The Board believes that integration is an important requirement for good education, and that segregated education is inferior education" (R. 19).

ARGUMENT

No substantial federal question is presented by the petition.

(1)

The petition (p. 3) refers to the Fourteenth Amendment as the primary constitutional provision involved and then lists the constitutional and statutory enactments of the State of New York which, it states, are also involved. The ruling of the New York Court of Appeals that the latter enactments were not violated by the respondents is binding on this Court and does not raise a federal question. *Cramp* v. *Board of Public Inst.*, 368 U.S. 278 (1961); *Speiser* v. *Randall*, 357 U.S. 513 (1958); *A.F.L.* v. *Watson*, 327 U.S. 582 (1946).

This leaves for the consideration of this Court the sole issue as to whether the petitioners' rights under the Fourteenth Amendment have been violated. That they have not been violated is established by the undisputed fact that J.H.S. 275 is an integrated school and admission to it is open to all children of junior high school age who live within the attendance zone of that school, and neither their race, color, creed nor national origin is made a criterion for their admittance.

The decision below is not in conflict with any decisions of this Court or of lower federal courts. In every case decided by this Court and lower federal courts in this field the constitutional rights of the complainants have been held to be violated only upon a showing that state action has resulted in the maintenance of racially segregated schools. In the earlier cases, of which *Brown* v. *Board of Education*, 347 U.S. 483 (1954) is typical, the state action consisted of the enactment of statutes or constitutional provisions which either required or permitted boards of education to operate segregated schools. In the more recent cases, the state action consisted of assignment plans or pupil transfer regulations which had the purpose and effect of separating children in schools according to their race. Typical of such cases are *Goss* v. *Board of Education of Knoxville, Tenn.*, 373 U.S. 683 (1963); *Green* v. *School Board of City of Roanoke*, 304 F. 2d 118 (4th Cir., 1962); *Dillard* v. *School Board of City of Charlottesville, Va.*, 308 F. 2d 920 (4th Cir., 1962), cert. den. 374 U.S. 827 (1963).

Petitioners ignore the rulings in these cases and are content to quote isolated statements in the opinions without regard to the facts or the determination in each case. Thus petitioners (p. 14) quote the following from *Goss* v. *Board of Education, supra*, 373 U.S., at p. 687: "Classifications based on race for purposes of transfers between public schools, as here, violate the Equal Protection Clause of the Fourteenth Amendment." This Court condemned the transfer plan in the *Goss* case, stating (p. 689): "But no official transfer plan or provision *of which racial segregation is the inevitable consequence* may stand under the Fourteenth Amendment." (Emphasis added.)

The *Goss* action was brought by Negro pupils who claimed that a pupil-transfer plan established by the public school authorities of Knoxville, Tennessee, violated their constitutional rights. The Court quoted the provisions of the plan, which established different transfer criteria for white and for colored children. The Court then said (373 U.S., at p. 686):

> "It is readily apparent that the transfer system proposed lends itself to perpetuation of segregation."

The Court concluded as follows (p. 688):

> "We hold that the transfer plans promote discrimination and are therefore invalid."

Petitioners (p. 15) quote the following from *Green* v. *School Board of City of Roanoke, Virginia, supra*, 304 F. 2d 118, 122:

> "As we have more than once made clear, school assignments to be constitutional must not be based in whole or in part on considerations of race."

The Court applied this principle in condemning the Roanoke pupil assignment system whereby white children were initially assigned to schools in one section of the city and Negro children to schools in another section, regardless of how near they might reside to the respective schools. In addition to the "discrimination inherent in the initial assignment system", the Court found the rules for transferring pupils were more stringent when the child applying for a transfer was a Negro. (304 F. 2d, at p. 123.) The Court held "the unequal application of transfer criteria"

to be a "violation of the Negro pupils' rights under the Fourteenth Amendment." (*ibid.*)

In *Borders* v. *Rippy*, 247 F. 2d 268 (5th Cir., 1957), cited at p. 15 of the petition, the Court held the complainants' constitutional rights to be violated by a dual racial school assignment plan under which "no Negro children could go to school with the whites." (p. 270.)

Petitioners' reliance on broad general statements without regard to the facts or the courts' holdings emphasizes the wisdom of the caveat expressed on more than one occasion by this Court as to the unreliability of such statements when urged in support of asserted constitutional rights.

In *Armour & Co.* v. *Wantock*, 323 U.S. 126 (1944), Mr. Justice JACKSON, writing for the Court, said (pp. 132-133):

> "It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion. * * * General expressions transposed to other facts are often misleading."

In *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960), this Court said (pp. 343-344, per FRANKFURTER, J.):

> "Particularly in dealing with claims under broad provisions of the Constitution, which derive content by an interpretive process of inclusion and exclusion, it is imperative that generalizations, based on and qualified by the concrete situations that gave rise to them, must not be applied out of context in disregard of variant controlling facts."

Again, in *Hughes* v. *Superior Court*, 339 U.S. 460 (1950), Mr. Justice FRANKFURTER, writing for the Court, concluded

his opinion with the cogent observation that "Generalizations are treacherous in the application of large constitutional concepts." (p. 469.)

Petitioners (pp. 13-14) cite and quote from *Bell* v. *School City of Gary, Indiana*, 213 F. Supp. 819 (N.D. 1963), aff'd 324 F. 2d 209 (7th Cir., 1963), cert. den. 377 U.S. 924 (1964), in which the Negro plaintiffs charged that the City was operating a segregated school system. The Court found that in some of the schools there was a preponderant enrollment of Negroes but that this resulted not from affirmative action of the school authorities but by reason of the segregation of the races in distinct sections of the City, in other words, what is known as *de facto* segregation. The Court rejected the plaintiffs' contention that the City was required, under mandate of the Constitution, to integrate the public schools, saying (p. 829) that "racial balance in our public schools is not constitutionally mandated."

The *Bell* decision lends no support to the petitioners. That action was brought, as has been noted, by Negroes to compel the school authorities to eliminate racial imbalance in the public schools. The instant proceeding was instituted by white persons who claim to have the constitutional right, perforce of the Equal Protection Clause of the Fourteenth Amendment, to compel the Board of Education to establish J.H.S. 275 as a *de facto* segregated school. Petitioners' position is contrary to the spirit, if not the letter, of the School Segregation Cases.

In the *Brown* opinion this Court held that the plaintiffs "by reason of the segregation complained of [are] deprived of the equal protection of the laws guaranteed by the Four-

teenth Amendment" (347 U.S., at p. 495). This Court has said: "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination." *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1954). The action of the Board of Education of which petitioners complain does not involve any discrimination, invidious or otherwise, because all children residing in the zone of J.H.S. 275 and possessing the necessary educational requirements are entitled to enroll in that school, regardless of their race, color or creed.

It affirmatively appears from the petition and the exhibits annexed to it that the new junior high school will be opened as an integrated school under the zone adopted by the Board of Education. Nothing decided in *Brown* v. *Board of Education* or in any subsequent case prevents the Board of Education from considering racial and ethnic factors in school zoning, unless it results in establishing a segregated school.

In accord with the decision of the Court of Appeals in this case are the following recent decisions. *Jackson* v. *Pasadena City School District*, 59 Cal. 2d 876, 31 Cal. Rptr. 606, 382 P. 2d 878 (Sup. Ct., Cal., 1963); *Morean* v. *Board of Education of Montclair*, 42 N.J. 237, 200 A. 2d 97 (Sup. Ct., N.J., 1964); *Fuller* v. *Volk*, 230 F. Supp. 25 (Dist. Ct., N.J., 1964).

In *Lynch* v. *Kenston School District Board of Education*, 229 F. Supp. 740 (Dist. Ct., Ohio, 1964), cited by petitioners (p. 16), the Court said (p. 744):

> "Plaintiffs have a constitutional right not to be objects of racial discrimination, and they can vindicate

> that right in an action before this Court, but they do not have a constitutional right to attend or to refrain from attending a particular school on the basis of racial considerations when there has been no actual discrimination against them."

Petitioners' children have not been made the objects of racial discrimination for the simple reason that J.H.S. 275 is an integrated school, admission to which is open to all residing within its zone regardless of race, creed or color.

(2)

Throughout their petition (pp. 5, 6, 7, 8, 13) petitioners assert that the Board of Education has unlawfully established in the new school an unlawful quota system based on race. The record provides ample contradiction of their claim (R. 23, 43-44). The percentages of 35.2 Negro, 33.6 Puerto Rican and 31.2 per cent white pertain to the 544 pupils who were expected to enroll in the new school in September, 1963 (R. 23). With the passage of time, as families move into and out of the zone of J.H.S. 275, these percentages will change, because any child living in the zone and possessing the required educational qualifications will be admitted to that school without regard to race, color or creed (R. 44). Residence within the school zone and not the percentages of the racial and ethnic groups in the entering class in September, 1963 is the determining factor of admission to the school now and in the future.

Petitioners' claim that a racial quota system has been established by the Board of Education is utterly without factual support and their assertion (p. 6) that the zoning plan establishes a "racial quota of exactly 35.2 per cent

Negro, 33.6 per cent Puerto Rican and 31.2 per cent others" is on its face absurd.

The Appellate Division of the New York Supreme Court rejected petitioners' contention in the following language (20 A D 2d, pp. 448-449, 248 N.Y.S. 2d, p. 584):

> "Petitioners' argument that J.H.S. 275 was zoned to establish a racial quota is wholly untenable. Indeed, it is conceded that a quota system is repugnant and illegal; but there was no quota system in the case at bar.
>
> All that the officials of the Board stated is that in September, 1963 the ethnic composition of J.H.S. 275 was expected to be 35.2% Negro, 33.6% Puerto Rican, and 31.2% white. A quota system is the establishment of a fixed immutable ratio in order to achieve and thereafter to *maintain and preserve* the same racial composition. That is not the intent here. Once the geographic boundaries (or zone) for attendance at J.H.S. 275 are prescribed, every child residing in that zone, if he has the necessary educational qualifications, may go to that junior high school, regardless of race or color and without any limitation as to percentage or number of qualified pupils of his own or of any other race or color. In actual operation, it is impossible to maintain and preserve the original ethnic composition, and there never was any intent to do so. In our opinion, the quota issue raised by petitioners is intended merely to give a semblance of illegality to the zone as fixed by the Board." (Italics by the Court.)

(3)

In their petition to the New York Supreme Court (R. 17) and in their present petition (p .4), petitioners claim that

the zone established by the Board of Education for J.H.S. 275 was unconstitutionally predicated on race and color. They thus fail to distinguish between discriminatory state action based on race or color and awareness or cognizance of color by the state in its efforts to achieve equality among the races. It is impossible to eliminate consideration of race or color from any plan to end *de facto* segregation in the public schools. As the New Jersey Supreme Court observed in a recent case, *Morean* v. *Board of Education of Montclair*, 42 N.J. 237, 200 A. 2d 97, 100 (1964):

> "Constitutional color blindness may be wholly apt when the frame of reference is an attack on official efforts toward segregation; it is not generally apt when the attack is on official efforts toward the avoidance of segregation."

The petition (p. 17) asserts as a fact the "inclusion of white children in, and exclusion of Negro and Puerto Rican children from assignment to a particular school, because they are white or Negro or Puerto Rican." This alleged "fact" is the direct opposite of the finding by the New York Court of Appeals (Petition, Appendix B. p. 7a): "The simple fact as to the plan adopted and here under attack is that it excludes no one from any school and has no tendency to foster or produce racial segregation."

Petitioners invoke the Fourteenth Amendment not as a shield against discriminatory state action but as a sword to compel the respondents to create a *de facto* segregated school at J.H.S. 275. In the first *Brown* decision, 347 U.S. 483, this Court, while holding that the operation of *de jure* segregated public schools is unconstitutional, also condemned as educationally inferior *de facto* segregated

schools. This Court quoted with approval the following holding of the Kansas court in one of the cases decided with *Brown* (347 U.S. at p. 494):

> "*Segregation of white and colored children in public schools has a detrimental effect upon the colored children.* The impact is greater when it has the sanction of the law; * * *." (emphasis supplied)

Petitioners have a constitutional right to attend an integrated school. They have no constitutional right to choose which of two integrated schools they shall attend.

CONCLUSION

The petition for a writ of certiorari should be denied.

August 13, 1964.

Respectfully submitted,

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